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Syed Mohamed Nur bin Ali (executor and dependant of Syed Mohd Azlan bin Syed Mohamed Nur, deceased) v Weddrin bin Mojingkin & Ors

B

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCVC-226–11 OF 2017
SEE MEE CHUN J
20 JANUARY 2020

C

Police — Duties of police — Breach of statutory duty — Whether police breached their duty of care — Whether arrest was lawful — Whether detainee sustained injuries during the course of arrest

D

Tort — Damages — Exemplary damages — Award against police — Whether police breached their duty of care — Whether the deceased death was as a result of the injuries inflicted by the defendants

E

This was a claim filed pursuant to ss 7 and 8 of the Civil Law Act 1956 by the plaintiff on his behalf and his wife, as dependents of their deceased son and for the estate of the deceased. This claim is a result of the deceased's death caused by the beating inflicted by a police arresting team, being the first to eleventh defendant's. The defendants denied any beating and that any injuries sustained were in the course of the deceased struggle to escape while being arrested and they were exercising their statutory duties in the arrest and detention. The defendants stated the deceased was aggressive but ultimately the deceased was arrested and handcuffed. According to them, the deceased had fallen on the floor during his struggle in resisting arrest and he had run and hit the wall as he tried to escape. They further contended that there was no evidence that the injuries were inflicted in the preceeding four hours prior to death and whether these were existing injuries and only cause of death was established but not who caused the injuries and how they were caused. The plaintiff also sought damages for the loss suffered.

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Held, allowing the claim with costs:

(1) The court found the argument that the deceased ran to the wall where he could not possibly escape as opposed to the door which was the only exit defied logic. The suggestion that the deceased was on drugs and from their experience such a person would be disorientated and run anywhere such as to the wall was not proven. There was no evidence the deceased was on drugs. In fact the allegation that the deceased was a drug dependent and dealer was never substantiated (see para 33).

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(2) It was only probable that there would be severe obvious pain after being inflicted with 61 injuries which would require medical treatment and it was to be expected the deceased would have complained he was unwell. There was no effort to send the deceased for medical treatment which was contrary to the standard operating procedures and as agreed by the fifth defendant (see para 53).

(3) The totality of the evidence showed that in all probability that the serious and multiple injuries were inflicted by the first to third defendants from the time of arrest and custody, which ultimately lead to his death. It was not probable for the defendants to claim all was normal despite the 61 injuries sustained and not provide him medical treatment. Thus, there was a failure to provide all and necessary medical treatment. The arrest of the deceased was lawful per se but not the manner in which it was effected (see paras 56–57).

(4) The plaintiff was awarded the following damages: (a) for loss of dependency amounting to RM67,200; (b) misfeasance in public office amounting to RM150,000; (c) exemplary damages of RM150,000; bereavement amounting to RM10,000; (d) funeral expenses amounting to RM5,000; and (e) special damages amounting to RM5,000 for travelling and RM800 for forensics report of (see paras 73, 75 & 77–81).

[Bahasa Malaysia summary

Ini merupakan satu tuntutan yang difailkan selaras dengan ss 7 dan 8 Akta Undang-Undang Sivil 1956 oleh plaintif bagi pihak isterinya dan dirinya sebagai orang yang bergantung kepada anak mereka yang telah mati dan untuk estet si mati. Tuntutan ini adalah atas sebab kematian si mati yang berpunca daripada kejadian pukul yang dilakukan oleh satu pasukan tangkapan poliis, iaitu defendan pertama hingga kesebelas. Defendan-defendan menafikan apa-apa kejadian pukul dan kecederaan yang dialami adalah disebabkan pergelutan si mati untuk melepaskan diri semasa ditangkap dan mereka sedang melaksanakan tugas statutori mereka dalam tangkapan dan penahanan tersebut. Defendan menyatakan bahawa si mati bertindak aggresif dan akhirnya si mati telah ditahan dan digari. Menurut mereka, si mati telah jatuh atas lantai semasa pergelutan merekas dan dia telah lari dan melanggar dinding semasa cuba untuk melarikan diri. Mereka juga mengatakan bahawa tiada keterangan yang kecederaan yang berlaku empat jam sebelum kematian dan sama ada ini merupakan kecederaan sedia ada dan hanya punca kematian dibuktikan tetapi bukan siapa atau bagaimana ianya dilakukan. Plaintitf turut menuntut untuk bayaran pampasan bagi kerugian yang dialami.

Diputuskan, membenarkan tuntutan dengan kos:

(1) Mahkamah mendapati hujahan yang si mati berlari ke dinding yang mana dia tidak mungkin akan dapat melepaskan diri dan bukannya ke

pintu yang merupakan satu-satunya jalan keluar tidak masuk akal. Hanya pengataan bahawa si mati adalah dibawah pengaruh dadah dan dari pengalaman mereka orang yang sedemikian akan berada dalam keadaan keliru dan lari kemana sahaja seperti ke satu dinding tidak dibuktikan. Tiada keterangan bahawa si mati dibawah pengaruh dadah. Walhal, pengataan bahawa si mati adalah seorang pengguna dan pengedar dadah tidak pernah disokong keterangan (lihat perenggan 33).

(2) Ianya hanya berkebarangkalian bahawa dia akan berada dalam keadaan sakit setelah dikenakan dengan 61 kecederaan yang akan memerlukan rawatan perubatan dan ianya adalah dijangka bahawa si mati akan turut mengadu bahawa dia tidak sihat. Tiada usaha untuk menghantar si mati untuk rawatan perubatan yang adalah bercanggah dengan prosedur operasi standard sepertimana dipersetujui oleh defendan kelima (lihat perenggan 53).

(3) Keseluruhan keterangan menunjukkan dalam semua kebarangkalian bahawa kecederaan serius dan banyak yang dilakukan oleh defendan pertama sehingga ketiga pada waktu tangkapan dan penahanan, yang akhirnya membawa kepada kematian si mat. Ianya tidak berkemungkinan untuk defendan menuntut bahawa semua perkara adalah normal meskipun 61 kecederaan yang dialami dan tidak memberikan kepada si mati rawatan perubatan. Oleh itu, wujud kegagalan untuk memberikan semua rawatan perubatan yang perlu. Tangkapan si mati adalah sah disisi undang-undang tetapi bukan cara yang mana ianya dilaksanakan (lihat perenggan 56–57).

(4) Plaintif diberi awad untuk ganti rugi seperti berikut: (a) untuk kehilangan kebergantungan berjumlah RM67,200; (b) misfeasans dalam pejabat awam berjumlah RM150,000; (c) ganti rugi teladan RM150,000; kedukaan berjumlah RM10,000; (d) perbelanjaan pengebumian RM5,000; dan (e) ganti rugi khas berjumlah RM5,000 untuk perjalanan dan RM800 untuk laporan forensik (lihat perenggan 73, 75 & 77–81).]

Cases referred to

Caparo Industries plc v Dickman and others [1990] 1 All ER 568, HL (refd)
DK Basu v State of West Bengal AIR 1997 SC 610, SC (refd)
Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal [2015] 1 MLJ 353; [2014] 9 CLJ 15, CA (refd)
Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop [2018] 5 MLJ 141; [2018] 5 MLRA 263, FC (refd)
Howard v Jarvis (1958) 98 CLR 177, HC (refd)
Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and

other appeals [2018] 3 MLJ 184; [2017] 6 MLRA 635, FC (refd)
Rookes v Barnard [1964] AC 1129, HL (refd)
Selvi a/p Narayan & Anor (joint administrator for the estate and dependant of Chandran a/l Perumal, deceased) v Koperal Zainal bin Mohd Ali & Ors [2017] 9 MLJ 300; [2017] 5 CLJ 84, HC (refd)
Suzana Md Aris v DSP Ishak Hussain & Ors [2010] 6 CLJ 712, HC (refd)

Legislation referred to

Civil Law Act 1956 ss 7, 7(3A), 8
Criminal Procedure Code ss 23, 28
Enforcement Agency Integrity Commission Act 2009 s 30, 30(4)
Evidence Act 1950 s 114(g)
Federal Constitution art 5
Government Proceedings Act 1956 s 5
Penal Code ss 34, 107, 148, 302, 304, 304(b)
Police Act 1967 s 20, 20(3)(j), (3)(m), (4)
Police Regulations 1952

M Visvanathan (Saibullah MV Nathan & Co) for the plaintiff.
Jailani bin Rahman (Johor State Legal Advisor Office) for the defendants.

See Mee Chun J:

INTRODUCTION

[1] This is a claim filed by the plaintiff on his own behalf and that of his wife as dependents of their deceased son, Syed Mohd Azlan bin Syed Mohamed Nur ('the deceased'), and for the estate of the deceased. The claim is pursuant to ss 7 and 8 of the Civil Law Act 1956. The letters of administration of the deceased's estated was granted to the plaintiff on 17 June 2015. The claim is a result of the deceased's death caused by the beating inflicted by a police arresting team.

[2] The first to 11th defendants are police officers who were one way or another involved in the arrest of the deceased in the early hours of 3 November 2014 and the events ensuing thereafter. The 12th defendant is the head of the Criminal Investigation Department, the 13th defendant the Inspector General of Police who is responsible for supervising and/or monitoring and/or control of all police personnel and the 14th defendant the Government of Malaysia as the employer and/or the principal to all the defendants.

[3] The defendants deny any beating and that any injuries sustained were in the course of the deceased struggle to escape while being arrested and they were exercising their statutory duties in the arrest and detention.

WITNESSES

[4] The witnesses for the plaintiff were:

(a) Syed Mohamed Nur bin Ali, father of the deceased (PW1) and witness statement marked as WSP1;

(b) Sharifah Kahlilah bte Sayed Sulaiman, mother of the deceased (PW2) and witness statement marked as WSP2;

(c) Syed Mohd Shariff bin Syed Mohamed Nur, elder brother of the deceased (PW3) and witness statement marked as WSP3;

(d) Dr Rohayu bt Shahar Adnan, pathologist (PW4);

(e) Dr Mohd Mahdzan bin Mazelan, attending medical officer (PW5);

(f) Eda Mazuin bt Abdul Rahim, legal officer, Enforcement Agency Integrity Commission (EAIC) (PW6):

(g) Mohd Nizan bin Idok, former supervisor at NHS Motor S/B (PW7);

(h) Syarifah Norhidayah SA Jamal, owner of burger stall (PW8); and

(i) Abdillah bin Idris, eyewitness (PW9).

[5] The witnesses for the defendants were:

(a) first defendant (DW1) and witness statement marked as WSD1;

(b) second defendant (DW2) and witness statement marked as WSD2;

(c) third defendant (DW3) and witness statement marked as WSD3;

(d) fourth defendant (DW4) and witness statement marked as WSD4;

(e) fifth defendant (DW5) and witness statement marked as WSD5;

(f) ninth defendant (DW6) and witness statement marked as WSD6;

(g) 11th defendant (DW7) and witness statement marked as WSD7;

(h) sixth defendant (DW8) and witness statement marked as WSD8;

(i) seventh defendant (DW9) and witness statement marked as WSD9; and

(j) tenth defendant (DW10) and witness statement marked as WSD10.

AGREED FACTS

[6] The agreed facts are in Bundle C. They are reproduced below and it sets out the events leading to the death of the deceased. They are as follows:

(a) the deceased was arrested and detained by the police in relation to an

investigation of a case under s 148 of the Penal Code at 3.30am on 3 November 2014;

(b) the deceased was arrested and detained by the police at No 62 Kg Simon, Teluk Ramunia, Sungai Rengit 81620 Pengerang, Johor (house);

(c) the deceased was then brought to the Balai Polis Sungai Rengit for interrogation;

(d) on the very same day, the deceased was subsequently taken from the said Balai Polis Sungai Rengit to be sent to Ibu Pejabat Polis Daerah Kota Tinggi;

(e) on the way there, the deceased was said to be in a weak condition and had no energy and did not respond to calls and/or questions made by police personnal escorting the deceased then;

(f) the deceased was said to have been taken to Klinik Kesihatan Bandar Penawar, Johor for treatment at about 8am and was subsequently confirmed dead at about 8.30am on the same date;

(g) a post mortem had been conducted on the body of the deceased by an expert forensics doctor wherein it was discovered that the deceased body had 61 wounds and/or injuries to the body wherein the cause of death was summarised to be due to 'blunt force trauma'; and

(h) the first defendant, second defendant and third defendant were charged with commiting a crime (with common intention) at the Kota Tinggi Sessions Court, Johor (Case No 61–1–5–6) with respect to an offence under s 304 of the Penal Code for causing the death of the deceased.

[7] With regard to the charge, the first to third defendants were acquitted by the sessions court at the end of defence case on 27 December 2017. The appeal by the public prosecutor to the Johor Bahru High Court was dismissed on 25 July 2019. A notice of appeal to the Court of Appeal was filed on 7 August 2019.

AGREED ISSUES

[8] The agreed issues are in Bundle D. They have been ably summarised by the plaintiff's counsel which the court reproduces as below:

(1) whether the manner of the deceased's arrest had been in accordance to the law?

(2) were the extensive injuries on the deceased's body caused by the defendants in this case?

(3) did the deceased die as a result of the injuries inflicted by the defendants?

(4) whether the defendants owed a duty of care towards the deceased who was under arrest and in the custody of the defendants at the material time?

(5) if yes, whether the defendants had breached the said duty of care in assaulting the deceased and injuring him and upon injuring him, had failed to provide all reasonable and necessary medical attention as soon it was discovered that the deceased had been injured and was in serious need of medical attention; and

(6) whether the defendants are liable to pay damages to the plaintiff.

Arrest of the deceased

[9] The situation in which police officers may arrest without warrant for commission of seizable offence is provided under s 23 of the Criminal Procedure Code ('the CPC'). Any police officer may arrest without warrant any person who has committed seizable offence or against whom a reasonable complaint has been made, or against whom credible information has been received, or against whom a reasonable suspicion exists.

[10] The 11th defendant was the assistant investigating officer (AIO) who had investigated the deceased's case under s 148 of the Penal Code (possessing weapons or missiles at riot). The AIO had testified that the deceased had been identified as one of the suspects who had committed the offence together with his friends. Sungai Rengit Report No 816/2014 dated 19 September 2014 (B/83) is referred to whereby the deceased was implicated in the police report. This means the arrest of the deceased was based on a reasonable complaint by one Amir Amirul bin Mohamad Yatim received by the police for the commission of a seizable offence ie s 148 of the Penal Code. The arrest of the deceased amounted to lawful arrest. The arrest was lawful per se as there was a basis for it. However the issue here is whether the manner of the arrest was in accordance to the law.

[11] PW5, the medical officer said the deceased was brought in dead on 3 November 2014 in between 8am to 8.30am at Klinik Kesihatan Bandar Penawar. A police officer making an arrest without a warrant shall within 24 hours after arrest, send the person arrested before a magistrate (s 28 of the CPC). The deceased had passed away about approximately five hours after his arrest, before he could be produced to the magistrate for remand. Therefore, at the time of his death, the deceased was still in lawful custody of police.

Duty of care

[12] The police owed a statutory duty of care to the deceased namely s 20 of

the Police Act 1967 and Police Regulations 1952 as the deceased was under lawful custody police prior to his death. In fact art 5 of the Federal Constitution guarantees the deceased's right to life and liberty where 'no person shall be deprieved of his life or personal liberty save in accordance with law'.

[13] In evidence, all the defendants agreed their duties as police officers were subject to the Police Act and the Police Regulations.

[14] Section 20 of the Police Act outlines the general duties of police officers. This includes a duty to give assistance to protect life and property (s 20(3)(j)). Further s 20(3)(m) read together with s 20(4) deems any police officer with custody of any persons as a prison officer with respective corresponding duties.

[15] The High Court of Australia in dealing with a situation of a person in the custody of the police stated in *Howard v Jarvis* (1958) 98 CLR 177 at p 183:

> We feel no doubt that the learned judges of the Supreme Court of Tasmania were right in holding that Howard was subject at common law to a duty to exercise reasonable care for the safety of Jarvis during his detention in custody. He had deprived Jarvis of his personal liberty, and assumed control of his person. In arresting and detaining Jarvis he was no doubt ating lawfully and properly and in the due execution of his duty, but he was depriving Jarvis of his liberty, and he was assuming control for the time being of his person, and it necessarily followed, in our opinion, that he came under a duty to exercise reasonable care for the safety of his person during the detention. If authority be needed for this proposition, ample authority is found in the cases cited by the learned Chief Justice of Tasmania.

[16] In *DK Basu v State of West Bengal* AIR 1997 SC 610 at p 615, the Supreme Court said:

> ... Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of an offence but it must be remembered that the law doeas not permit use of third degree methods or torture of accused in custody during interrogation and investigation with that view to solve the crime. End cannot justify the means ...

[17] In *Halsbury's Laws of Malaysia* (Vol 5, 2000) it was stated at para 80.132:

> Liability for omissions ... However, a duty to act may be imposed in circumstances where the defendant has undertaken a responbility for the plaintiff himself, or for property or for third parties which caused damage to to the plaintiff. The defendant's responsibility may be founded on the general nature of the relationship between the parties, or by reason of the specific conduct of the defendant either by exposing the plaintiff to danger, or by creating an expectation that the defendant will act to protect the plaintiff. The standard of care imposed on the defendant where there is a duty to protect the plaintiff from such actionable omission is

A satisfied either by: (1) showing that the thing the defendant did not do was a thing commonly done by other persons in like circumstances; or (2) showing that it was a thing which was so obviously wanted that it would be a folly in any one to neglect to provide it ...

B **[18]** *Suzana Md Aris v DSP Ishak Hussain & Ors* [2010] 6 CLJ 712 succintly stated at pp 718–719:

... As a detainee the deceased would not be free to have himself medically attended to as he would a free man. Having taken the deceased lawfully under its custody his wellbeing was in the hands of the police for as a detainee he would not be in a C position to have himself medically attended to as he would a free man. The police therefore owed him a duty of care to ensure the appropriate medical care would be extended to him during the period he was in its custody within the criteria set in *Caparo Industries plc v Dickman and others*.

D **[19]** *Caparo Industries plc v Dickman and others* [1990] 1 All ER 568 referred to, enunciated the test for deciding if duty of care is owed. In essence, the requirements are foreseeability of damage, relationship characterised by the law as one of 'proximity' or 'neighbourhood', and that the situation is one that the court considers it fair, just and reasonable to impose a duty of care.

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[20] The Court of Appeal in *Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal* [2015] 1 MLJ 353; [2014] 9 CLJ 15 held:

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The police force is a public professional body and as in other professional bodies there exist duties of care in their discharge of their powers. In the context of the police force, it is their standard operating procedure (SOP) and that should be subject to scrutiny by the court of law. As to what that duty of care and standard of G care are depend on the circumstances of each indivudual case and it is for the courts to determine what that duty and standard of care are. ...

[21] In *Selvi a/p Narayan & Anor (joint administrator for the estate and dependant of Chandran a/l Perumal, deceased) v Koperal Zainal bin Mohd Ali & Ors* [2017] 9 MLJ 300; [2017] 5 CLJ 84 the High Court stated at pp 337–338 (MLJ); pp 117–118 (CLJ):

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[127] ... In my view, there is no question that there is a duty of care which is owned by the police to those who are held in detention. No doubt, the detention itself may be lawful in the sense that there may have been a valid basis for their arrest. The issue I is not about the arrest or the lawfulness of the detention or remand order but whether the detaining authorities owe a duty of care to the detainees whilst they are in detention in the police look-up.

[128] In my view, both under common law and under statute, there is a duty of care to ensure that the detainee is not harmed by the police or by other detainees or that

they do not harm themselves. Insofar as the common law is concerned, the principle is well established by the cases referred to above and it is trite that detaining authorities do owe a duty of care to ensure that the detainees/prisoners are healthy and are given proper medical care during the period of incarceration. There is also a duty to ensure that the detainees are not harmed by the detaining authorities or by other inmates or even self-harm or suicide. In this regard, it is relevant to refer to the judgment of Lord Bingham of Cornhill in *Amin, R (on the application of) v Secretary Of State For The Home Department* [2003] UKHL 51 ; [2003] 4 All ER 1264; [2004] 1 AC 653; [2004] AC 653; [1998] 1 WLR 972; [2003] UKHL 51; 15 BHRC 362; (2004) 76 BMLR 143; [2003] 3 WLR 1169; [2004] HRLR 3 which lucidly illustrates the general duty of care that is imposed on the police or prison authorities. In this context, it is necessary to acknowledge that the late Lord Bingham has been one of the greatest proponents of the rule of law in recent times. He drew inspiration from Indian jurisprudence and said:

> A profound respect for the sancity of human life underpins the common law as it underpins the jurisprudence under articles 1 and 2 of the Convention. This means that a state must not unlawfully take life and must take appropriate legislative and administrative steps to protect it. But the duty does not stop there. The state owes a particular duty to those involuntarily in its custody. As Anand J succinctly put it in *Nilabati Behera v State of Orissa* (1993) 2 SCC 746 at 767:
>
> > There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life.
>
> Such persons must be protected against violence or abuse at the hands of states agents ...

[22] The above cases would more than sufficiently show that the defendants owe a duty of care towards the deceased who was under arrest and in the custody of the defendants at the time of his death. In particular, the duty of care is to ensure the deceased is not harmed, the health and that proper medical care is given during the period of custody.

Acts of the defendants

[23] The evidence of PW9 was that on 3 November 2014, the ninth defendant had instructed him to call the deceased to the house in order to arrest the deceased. The house was in fact PW9's house. The deceased did go to the house in the early hours of 3 November 2014 and the ninth defendant was duly informed.

[24] PW9 said he and the deceased were chatting in a room when the police kicked the door of the room, broke in and instructed them to lift up their hands and stand. Both he and the deceased were told to lie facing down (*menyiarap*). The police arrested the deceased and handcuffed him with the hands at the back. They 'mendirikan the deceased daripada menyiarap' and began beating

him. There were 5–6 policemen who beat the deceased. This was 'depan belakang tepi keliling, ada belakang depan kepala' and 'dah teruk Azlan kena pukul'. He managed to crawl out of the room and ran away to the back garden to a friend's house about 500 meters away. While running away he could still hear the deceased shouting 'minta tolong minta ampun sakit tuan ampun tuan'.

[25] He stated he was a witness for the prosecution in the sessions court case and his evidence then was the same as now.

[26] In cross-examination he stated that he was not smoking syabu while in the room with the deceased. In his words 'masih berbual belum menghisap'. He had one packet of *syabu* to be shared with the deceased. He agreed to the suggestion that when the police broke in, he was smoking *syabu* and hallucinating (*dalam keadaan khayal*). He disagreed as he was hallucinating, what he witnessed did not happen; this was because he saw with his own eyes. He also disagreed he did not see the policemen beating the deceased.

[27] In re-examination as to the contradiction he was not smoking *syabu* and yet hallucinating, he explained he was not hallucinating and he was about to smoke *syabu* when the police came. He further stated he saw the beating as he was next to the deceased and he had yet to crawl out of the room.

[28] The undisputed responsibilities of the defendants at the time of the raid and arrest and subsequently are as follows:

(a) the first defendant to third defendant: arresting team with the first defendant as the leader;

(b) the 11th Defendant: AIO; and

(c) the other defendants stood guard as follows:

(i) the fourth defendant: front of the house;

(ii) the fifth defendant and ninth defendant: door to the room;

(iii) the sixth defendant: front of the room;

(iv) the seventh defendant and eighth defendant: outside the house; and

(v) the tenth defendant: back of the house.

[29] It was also not disputed the room has only one exit, which is the door.

[30] The collective evidence of the defendants was the raid and arrest team arrived at the house at 3am of 3 November 2014.

[31] The collective evidence of the first to third defendants being the arrest team was that they were in the room for around 3–5 minutes to effect arrest. The first defendant went to the other person in the room, which was PW9 and the second and third defendant to the deceased.

[32] All denied beating the accused and stated the deceased was aggressive but ultimately the deceased was arrested and handcuffed. According to them, the deceased had fallen on the floor during his struggle in resisting arrest and he had run and hit the wall as he tried to escape.

[33] There was however only one exit from the room which was the door. It is the court's finding it defies logic that the deceased would run to the wall where he could not possibly escape as opposed to the door which was the only exit. The suggestion that the deceased was on drugs and from their experience such a person would be disorientated and run any where such as to the wall was not proven. There was no evidence the deceased was on drugs. It was the second defendant's evidence there was no evidence the deceased had been using drugs nor were any drugs found in the room. In fact the allegation that the deceased was a drug dependent and dealer was never substantiated.

[34] It was the second defendant's evidence he had been injured in the arrest. This was in all probablity an after thought to bolster the evidence the deceased was aggressive throughout the arrest. There was no evidence of the injuries in the form of medical records produced in court.

There was only his police report dated 5 November 2014, which was two days after the death of the deceased, which without more, cannot support his evidence.

[35] If the injuries of the deceased were as a result of him falling on the floor and hitting the wall, it is not probable for him to have suffer 61 marks of injuries as per the evidence of PW4, the pathologist, within a short span of 3–5 minutes. The only reasonable probablity that can be drawn is that the deceased had been beaten up by the police while in custody.

[36] The evidence of PW9 on having witnessed the policemen beating the deceased is credible and cogent. His presence in the room was confirmed by the defendants. He was not hallucinating as he had not smoke *syabu*; he was about to; when the police arrived. He was next to the deceased when the beating was taking place. In short, he was an eyewitness to the beating inflicted on the deceased.

[37] PW9's evidence that he was asked to call the deceased to the house was confirmed by the ninth defendant who when asked on his source which

A resulted in the raid said it was PW9. As PW9 was the ninth defendant's source it is probable the ninth defendant would have instructed him. This is also consistent with his evidence he was not arrested then as he was the police's source. His evidence that the ninth defendant had called him later to dispose of the bloodied items in the room was consistent with the admission of the ninth B defendant he called PW9. There would have been no reason for the ninth defendant to otherwise call. His consistency of evidence points towards PW9's evidence on the deceased being beaten up as credible.

C **[38]** PW4 had conducted a post mortem on the deceased on 4 November 2014 and the post mortem report can be found in B/76–82 and the photographs in B/38–74. PW4 found 61 marks of injuries on the deceased and the cause of death was blunt force trauma to the chest. PW4 concluded in her post mortem report at B/81 as follows:

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> 2. There were multiple bruises and abrasions on the body consistent with hand cuff imprints, defensive wounds and offensive wounds in keeping struggle and restraint during a commotion.

E **[39]** In her examination-in-chief she confirmed the 61 marks of injury were from a blunt object and consisted of bruises, lacerations and tears. On the internal examination for scalp at B/79 where it was noted 'injuries as described in the 'marks of injuries' above, she was asked what were the injuries and the cause, she replied it was injuries to the head, scalp and specifically to that part F of the head at item No 10 and 11'. The marks of injury in Nos 10 and 11 were described as:

> 10. Bruise (subgaleal haematoma) on the right head measured 15 x 9.5 cm.
>
> 11. Bruise (subgaleal haematoma) on the left head measured 15 x 5 cm.

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The injury of 15 x 9.5 cm was a huge bruise caused by a blunt and hard object.

[40] To a question on her summary and conclusion she answered:

H

> After conducting post mortem the deceased suffered from multiple blood injuries which were abrasions, bruises and lacerations on his head face torso which were actually front of chest and back both his upper and lower limbs from here it shows that deceased involved in a commotion involving not only one individual but more than one individual as the injuries throughout his body on his front and back and I injuries on the upper limbs were consistent with being restrained and also deceased punching. There was also evidence of kicking, all these injuries denotes that deceased involved in a commotion. Injuries on the front and back of torso is actually chest injury which produce bruised heart. Bruised heart was actually the result of the fatality. ...

[41] PW4 had also given evidence in the sessions court case and her evidence then was the same as now.

[42] In cross-examination she said she was not present at the time of the incident and she would not know exactly how the incident happened.

[43] It was contended by the defendants that there was no evidence that the injuries were inflicted in the preceeding four hours prior to death and whether these were existing injuries and only cause of death was established but not who caused the injuries and how they were caused.

[44] It goes without saying that the post mortem was to determine cause of death where it was an agreed fact that it was due to 'blunt force trauma to the chest'. PW4 had given unchallenged evidence that the injuries sustained were abrasions, bruises and lacerations on the head, face, torso, which were actually front of chest and back and both the upper and lower limbs showed that the deceased was involved in a commotion involving more than one individual as the injuries throughout his body on his front and back and injuries on the upper limbs were consistent with being restrained and also being punched. There was also evidence of kicking. The evidence too of bruise (subgaleal haematoma) on the right head measuring 15 x 9.5 cm being a huge one and caused by a blunt hard object also went unchallenged. The specific conclusion in para 2 that 'there were multiple bruises and abrasions on the body consistent with hand cuff imprints, defensive wounds and offensive wounds in keeping struggle and restraint during a commotion' remained unchallenged.

[45] Given that the deceased was last in the custody of the police before his death it must surely point towards those extensive 61 injuries being inflicted by them. The words 'multiple bruises and abrasions on the body consistent with hand cuff imprints, defensive wounds and offensive wounds in keeping struggle and restraint during a commotion'; in particular 'defensive wounds and offensive wounds' would describe the injuries sustained by the deceased when under custody. The evidence of the deceased being involved in a commotion with more than one individual would similarly point towards that.

[46] PW1, PW2 and PW3 had given evidence that the deceased was last seen a day prior to his demise, ie 2 November 2014 at 8–9pm. The deceased together with his siblings had helped PW1 and PW2 to move things to their newly rented house and he was in good health without any injuries. The deceased also must surely have been in good health for him to be able to go to the house when asked by PW9.

[47] The fourth defendant, seventh defendant and tenth defendant did not witness the arrest as they were standing guard outside the house. Neither did

the sixth defendant. The fourth defendant only heard the raiding team shouting 'Saya polis'. The seventh defendant stated he heard noices like shouting while the tenth defendant also said he heard voices shouting. The sixth defendant heard noices too. All did not notice any injury on the deceased when he was brought out. The sixth defendant who was at the outside of the room even stated he stood guard for more than an hour.

[48] The fifth and ninth defendants stated they witnessed the arrest. Their evidence of the deceased falling on the floor during his struggle in resisting arrest and running and hitting the wall were the same as that of the first to third defendants. This is not to be believed for the same reasons this court did not believe the first to third defendants evidence.

[49] After the arrest the team went back to the balai police in Sungai Rengit taking with them the deceased. The second defendant said they arrived around 4am where he and the first defendant interrogated the deceased until 7am. Around 7.15am the deceased was in the vehicle on the way to IPD Kota Tinggi when he fell unconscious into the fifth defendant whereupon the team was diverted to the nearest health clinic at Bandar Penawar which they reached at 8am.

[50] So all in all the deceased was in the custody of the police from the time of arrest at approximately 3.30am to his time of death at 8.30am. This was a good five hours. Even if taking away the hours that from the defendants version the interrogation lasted until 7am and when they first realised the deceased was unwell when he fell unconscious on the way to Kota Tinggi, that would make it about four hours of custody.

[51] As to the injuries of the deceased, all the defendants testified to only a few mild injuries which were 'kecederaan lebam bahagian pipi kanan dan kiri, kening sebelah kiri luka dan lebam di bahagian belakang' (B/84) or not being aware or being told of it. The first defendant said the deceased was normal. All this evidence flies in the face of the 61 marks of injury sustained by the deceased as stated in the post mortem and in the words of PW4 were serious bodily injuries.

[52] There were also claims that the deceased had never complained of being unwell. The first defendant said after the arrest, he had inspected the deceased for signs of injury and it was recorded in his arrest report. The third defendant too did not examine the deceased for injuries after the arrest despite being aware of the injuries then. The fifth defendant stated that after the arrest he did not examine the deceased and was not aware if anyone did. He also stated that 61 injuries were not normal. The ninth defendant had agreed that the deceased would have been in pain after suffering 61 injuries.

[53] The court finds it is only probable there would be severe obvious pain after being inflicted with 61 injuries which would require medical treatment and it was to be expected the deceased would have complained he was unwell. There was no effort to send the deceased for medical treatment which is contrary to the SOP and as agreed by the fifth defendant. The first defendant had stated he was aware the deceased had been injured after the arrest and there was a duty to refer the deceased for medical treatment pursuant to item 4.4.2 of SOP.

[54] There was no evidence from the eighth defendant who from the statement of defence stood guard outside the house. The evidence from the other defendants and PW1 also showed he had led the raid on PW1's house upon the deceased confession he was in possession of a baretta pistol and discovered none. The evidence produced insofar as the eighth defendant is concerned would not support a case against him.

[55] The 11th defendant was the AIO and was not a part of the raid and arrest team. There was no evidence to support a case against him too.

[56] The totality of the evidence above shows in all probablity that the serious and multiple injuries, 61 in all, were inflicted particularly by the first to third defendants from the time of arrest and custody. This ultimately led to his death with the cause of death being blunt force trauma to the chest. It was not probable for the defendants to claim all was normal with the deceased despite the 61 injuries sustained and not bring him for medical treatment. There was thus a failure to provide all reasonable and necessary medical attention upon the realisation of the deceased severe injuries. The Borang Pol which is the police very own document to request for post mortem in B/39 stated that while the deceased was at the balai polis Sungai Rengit he complained of difficulty in breathing.

[57] The defendants owe a duty of care towards the deceased who was in their custody. The existence of such a duty has been laid down in the law and cases referred to earlier. The issues to be tried as set out earlier, other than issue (6) on liabilty to damages to be dealt with subsequently, are all answered in the affirmative as against the first to the seventh defendants, ninth and tenth defendants. With regard to issue (1) as to whether the manner of the arrest was in accordance to the law, the arrest was lawful per se as there was a basis for it but not the manner in which it was effected.

[58] The 12th defendant and the 13th defendant are the ultimate superior officers responsible for supervising, monitoring and controlling the police personnel under their charge. The 14th defendant is vicariously responsible pursuant to s 5 of the Government Proceedings Act 1956 which renders the

Government of Malaysia liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as a principal to his agent.

Others

[59] The allegation by the defendants the deceased was aggressive with a history of drug abuse, a drug dealer, in possession of a Magnum firearm and ten live bullets and was placed under a restriction order remained just that, an allegation. No drugs and firearm or live bullets were discovered and the police ended up seizing two handphones as per the first defendant's evidence. The confession of the deceased he had a baretta in his father's house which lead to that house being raided also unravelled nothing.

[60] The second defendant had confirmed using handcuffs that were not issued by the police force and he agreed it was not in compliance with the police SOP and he may have been in breach thereof. His explanation was that the government's handcuffs had been taken by another police personnel and when the instruction to raid came it did not occur to him to seek its return. Whatever the reason, it could not possibly exculpate him using non commisioned handcuffs.

[61] None of the defendants produced the station diary that would show their movement where it was agreed every movement had to be recorded. Neither was the pocket book of each defendant that was agreed had to be carried by every police personnel to record their daily actiities. These are very important documents and their non production would lead to the invocation of adverse inference under s 114(g) of the Evidence Act 1950.

[62] The fact that the first, second and third defendants were acquitted by the criminal court for the offence under s 304(b) of the Penal Code is not relevant to this court. What is required to be proved here is on a balance of probabilty there was a duty of care and that such duty had been breached.

EAIC report (exh P2)

[63] The EAIC had conducted an investigation into the death of the deceased and its report is in B/101–144. The EAIC report ('report') was marked as exh P2 through PW6 the EAIC legal officer who confirmed it was prepared by the EAIC. All the defendants confirmed they gave evidence before the EAIC as did PW4 and PW9.

[64] The EAIC found the death of the deceased to have resulted from the use of violent physical force on the deceased, the failure of the police to refer the deceased for medical treatment, recommended the first, second and third defendants be charged for offences under s 302 read together with ss 34 and 107 of the Penal Code and noted the many violations in the manner of arrest and suppression of evidence. The post mortem report was accepted as to the cause of death (B/134–137).

[65] It was argued that the report should not be admitted and considered by the court as it is prohibitted under s 30(4) of the Enforcement Agency Integrity Commission Act 2009 ('the EAIC Act').

[66] Section 30 of the EAIC Act deals with the findings of the EAIC after investigation. Section 30(4) provides as follows:

> (4) Where a charge is preferred by the Police Prosecutor, any evidence obtained by the Commission under this Act may, notwithstanding the provisons of any other written law to the contrary, be used for the purpose of criminal proceedings.

[67] A perusal of the aforesaid provison only means that any evidence obtained by the EAIC may be used for the purpose of criminal proceedings notwithstanding any law to the contrary. It does not prohibit a civil court from considering any evidence so obtained. The court still has to deal with that evidence and consider it in the light of the civil trial.

[68] In any event this court had considered the evidence as was presented before by it hearing the oral evidence of all witnesses and the documents produced before it. It did not solely rely on the report as otherwise there would have been no necessity for a trial. Suffice to say the finding of this court and the EAIC was the same as to the death of the deceased being caused by the injuries sustained as a a result of the beating inflicted by the defendants.

Damages

Loss of dependency

[69] The evidence of PW1–PW3 were that the deceased was working in NHS Motor S/B (NHS) and worked part time nightly in a burger stall. He was earning about RM3,000 a month. The deceased gave RM300–RM350 to PW1 and RM1,000 to PW2. The evidence of PW7, as the supervisor, was that the deceased worked at NHS and the salary slips were as in B/15–20. PW8 was the owner of the burger stall who had engaged the deceased from May–October and paid him RM20–RM30 daily in cash.

[70] The court accepted the evidence that the deceased was working in NHS as it was confirmed by the former supervisor. The monthly salary of around RM1,965–RM,1970 was also confirmed and as shown in the salary slips from May–October 2014.

[71] The court was however unable to accept the evidence of a part time night job at a burger stall. PW8 claimed to be able to sell 70–100 burgers daily where a chicken burger sold for RM3 and her cost was RM200. On the basis of 100 burgers at RM3 her sales would be RM300 giving a profit of RM100. She disagreed with that profit she would not be able to pay the deceased. The court was unable to believe her evidence considering this was a small stall where every single cent counts and paying RM20–RM30 daily would take a toll on the profits earned by the owner. PW8 had known the deceased since primary school and their mothers were close and she too was close to the deceased. It is probable her evidence was to help the mother of the deceased. She also said the stall closed three months after the deceased died as business became bad. If indeed she was able to sell 70–100 burgers a day there would be no reason for the stall to close. The suggestion that the deceased did not work there but went there to hang around is probable considering he already had a full time job and there would be no reason for this part time job which would be tiring especially when the owner said the stall operated seven days a week.

[72] It was not probable for the deceased to have given RM300–RM350 to his father and RM1,000 to his mother. The father had a monthly pension of RM700 which he said was fully spent on household expenses and utilities. He could not remember the last time the deceased gave him money. If indeed the deceased gave every month it is not probable he could not remember. As for the RM1,000 to the mother, she said it was utilised for monthly expenses such as meals, utilities and clothes. Considering she was staying with the husband and his earlier evidence he spent his pension on household expenses and utilities this would mean she was not paying for that. This evidence would show the monthly payment was inflated. They also had four other adult children who could be expected to also contribute and not just the deceased although he was staying with them.

[73] The court will accept the amount of RM350 as the monthly payment to the parents, as submitted by the defendants. The award is RM350 x 16 years x 12 = RM67,200.

Estate claim for misfeasance in public office

[74] In *Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals* [2018] 3 MLJ 184; [2017] 6 MLRA 635 the Federal

Court stated at p 238 (MLJ); p 668 (MLRA) as follows:

> [138] The learned senior federal counsel conceded that misfeasance in public office was commited in regard to the various acts which were done or omitted to be done by the police officers before Kugan's death. ...
>
> [139] We therefore allow the appeal in part. The order of the Court of Appeal on exemplary damages is set aside.
>
> [140] In view of the acts done omitted to be done to Kugan which contributed to the cause of his death, we do not consider the amount of RM100,000 awarded as damages for misfeasance in public office to be inappropriate. We therefore affirm the amount so awarded.

[75] There can thus be a claim for misfeasance in public office. As the deceased had sustained severe and multiple injuries totalling 61 in all while in custody, the court awards RM150,000. This is to send a strong message that deaths in custody will not be tolerated and condoned by the courts.

Exemplary damages

[76] In *Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop* [2018] 5 MLJ 141; [2018] 5 MLRA 263 the Federal Court had decided with approval via a 4-1 majority the decision of YA Justice Zainun Ali FCJ in *Ketua Polis Negara*. It stated at p 185 (MLJ); p 306 (MLRA):

> [125] This court, in the judgment of Zainun Ali FCJ in *Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals* [2018] 3 MLJ 184; [2017] 6 MLRA 635 in disagreeing with the views of the majority in Appeal No 01(i)-52–10 of 2015(W) had expressed the following on the award of exemplary damages to victims of a constitutional violation to which we subscribe:
>
> > 69. What is important in this appeal is that, once it is accepted that by the common law of England a victim of a constitutional violation has the right to be compensated by an award of punitive, exemplary or aggravated damages, that in itself translates into a right guaranteed under act 5(1) of the Federal Constitution which for ease of reference is one again illustrated below, where it reads:
> >
> > > No person shall be deprived of his life or personal liberty save in accordance with the law.
>
> [126] At para 71 of the judgment, Her Ladyship further opined:
>
> > 71. Accordingly, where a wrong is committed by the state or an instrument of the state which has the effect of depriving the victim of his life (in the widest sense as held by this court in *Lee Kwan Woh v PP* [2009] 5 MLJ 301; [2009] 2 MLRA 286, in a manner not in accordance with law, the victim is entitled to an award of exemplary or aggravated damages.
>
> [127] For the reasons above stated, by majority, the appeal is hereby dismissed and

A we affirm the decision of the Court of Appeal and answering the sole question posed before us in affirmative. In respect of the award of exemplary damages, we are inclined to increase it to RM100,000 as to reflect the court's indignation towards the actions of the police.

B **[77]** This case is thus authority that exemplary damages can be awarded in an estate claim. The oft quoted case of *Rookes v Barnard* [1964] AC 1129 is ample authority that it can be awarded where the acts committed are oppresive, arbitrary and unconstitutional which it certainly was in this case. For this head of claim the court awards RM150,000.

C

Bereavement

[78] Section 7(3A) of the Civil Law Act prior to its amendment provides for damages of RM10,000 which the court now awards. The pre-amendment provision applies as the death was on 3 November 2014.

D

Funeral expenses

E **[79]** Funeral expenses of RM5,000 as pleaded is allowed.

Special damages

[80] Special damages of cost of travelling for RM5,000 and forensics report of RM800 is allowed.

F

Interest

[81] Interest of 5% on the judgment sum from 3 November 2014 until full realisation.

G

CONCLUSION

H **[82]** The plaintiff's claim as above is allowed with costs.

[83] The court will be remiss if it did not take this opportunity to remind the police of their duty to uphold the law and safeguard the peace and security of the nation and that all actions towards that must be in accordance with the Federal Constitution and the law. As such, and as per *Hassan bin Marsom* at p 185 (MLJ); p 265 (MLRA), an award of damages must reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach and deter future breaches.

I

Claim allowed with costs.

Reported by Izzat Fauzan